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IN THE

Supreme Court of the United States

October Term, 1961.

No. 192.

MORRIS C. GOLDBERG, also known as
M. C. GOLDBERG,

Petitioner,

v.

A. ARTHUR TRACY, also known as
ARTHUR TRACY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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v.

A. ARTHUR TRACY, also known as ARTHUR TRACY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Morris C. Goldberg, Petitioner, prays that a writ of certiorari issue to review the judgment for the United States Court of Appeals for the Third Circuit, entered in the above entitled case on April 18, 1961.

OPINIONS BELOW.

The Opinions of the District Court are not officially reported, but appear in the Appendix filed in the Court below at pp. 532a to 571a, inclusive. The Opinion of the Court of Appeals filed on April 18, 1961, printed in Appendix B hereto, *infra* p. 19, is reported in 289 F. 2d 467.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED.

The judgment of the Court of Appeals for the Third Circuit was entered on April 18, 1961 and is annexed hereto as Appendix C. Jurisdiction of this Court to review a final judgment of the Court of Appeals in a diversity case is invoked under Title 18, U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

I. Is an office memorandum prepared by a lawyer in connection with transactions involved in collateral litigation admissible as a business record within the purview of the Act of June 25, 1948, c. 646, 62 Stat. 945, 28 U. S. C. A., Section 1732(a) as amended?

II. Whether in diversity of citizenship cases the Federal Courts must apply and follow the substantive law of the state where the cause of action arose and was tried as to the burden of proof and the interest and credibility of witnesses.

III. In the trial of a civil action to recover compensation for services rendered, may claimant be cross-examined as to personal and collateral matters of a degrading nature tending and calculated to stir resentment and arouse the prejudice of the jury?

STATUTES INVOLVED.

The statutory provisions involved are:

The Act of June 25, 1948, c. 646, 62 Stat. 945, 28 U. S. C. A., Section 1732(a) as amended. The pertinent section of said statute reads as follows:

> "(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
>
> The term 'business' as used in this section, includes business, profession, occupation, and calling of every kind."

The Act of June 25, 1948, c. 646, 62 Stat. 944, Section 1652 of 28 U. S. C. A., as amended, which reads as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944."

STATEMENT OF THE CASE.

On March 23, 1949, during a vacation trip in Florida, respondent loaned petitioner $25,000.00, on account of which $8,500.00 was repaid. Suit was instituted to recover the balance of $16,500.00—which was admittedly due—but petitioner asserted three counterclaims, two of which are material here.

The first counterclaim was for $50,000.00 as compensation for services rendered by petitioner in effecting settlement of disputes arising from an apartment building enterprise in which respondent and his brother-in-law Stevens were partners.

The facts material to the consideration of the questions presented are:

For a considerable period of time prior to July 1948 respondent and his brother-in-law, Stevens, were involved in an apartment building project in which respondent claimed he had invested approximately $650,000.00 (403a). Differences existed between them and, as a consequence, extensive and protracted litigation developed.

Stevens was represented by J. M. Earnest, Esquire, and respondent by C. R. Franchot, Esquire, both District of Columbia lawyers. During July 1948 respondent told petitioner that he had invested heavily in the operation with Stevens; that his financial affairs were all tied up; that he was receiving no returns on his investment; that he was without funds and that the litigation was costly; and that bad blood existed between them which made personal negotiations difficult (47a-52a, incl.).

Respondent proposed that if petitioner could straighten out the tangled affairs he would pay him $100,000.00 (55a). Petitioner thereupon undertook to resolve and adjust the differences. As the basis for settlement, petitioner recommended that respondent appoint a representative and that Stevens appoint one. Accordingly, respondent appointed

Samuel Kamens, and Stevens appointed J. Jerome Katz (72a, 73a).

In consequence of petitioner's efforts, an agreement was reached whereunder: respondent was to have a 55% interest and Stevens a 45% interest in the corporation; Stevens was granted a 120-day option to purchase respondent's stock for $1,200,000.00; the corporate indebtedness to Stevens was fixed at $19,000.00, and that to respondent at $92,000.00; if Stevens did not exercise the option, the corporate assets were to be offered for sale on the open market at $4,900,000.00; upon sale of the properties respondent was to be first reimbursed for his original investment of $250,000.00 and the balance to be distributed under said ratio of 55% to respondent and 45% to Stevens; and finally Kamens and Katz were to manage the corporation for which each was to receive a fixed compensation of $15,000.00 a year and all pending litigation was to be withdrawn.

On August 5, 1948 Mr. Earnest was advised of the terms of the settlement by Katz and Stevens—petitioner was not present—and on the following day he prepared a memorandum titled "Office Memo—August 6, 1948—re: Settlement of Tracy-Stevens Litigation". On August 13, 1948 a formal agreement embodying said terms was prepared and executed by the parties (155a). At the trial Mr. Earnest was called as a witness for respondent and he produced said "Office Memo". The memorandum was admitted into evidence over objection as "Exhibit P 3" (478a-481a, incl.), and was sent out with the jury over further objection (415a-416a).

The first paragraph of said memorandum declares that Katz, as representative of Stevens, and Kamens, as representative of respondent, "had negotiated a compromise settlement between the parties and upon the following terms . . .". This statement was in direct conflict with and in contradiction of petitioner's counterclaim for which he claimed $50,000.00 on the basis that he alone negotiated the agreement.

The Court of Appeals decided that the attorney's memorandum was admissible as a record made in the regular course of business pursuant to the provisions of 28 U. S. C. A. 1732(a). The Court, in ignoring petitioner's contention that the contents of the memorandum were highly prejudicial to his claim, stated: "The most that is urged against the memorandum going into evidence is that no need for it was shown" (Appendix B; p. 25).

The second counterclaim was for reimbursement of $2,694.41 which petitioner expended on respondent's account during the Florida trip during March 1949. The trip was arranged after petitioner completed his services under the third counterclaim, the facts of which are not material here.

Petitioner announced that he was in need of a rest and that he intended to go to Florida; respondent stated he would also like to go but had no immediate cash; petitioner agreed to advance the necessary funds and that respondent could repay him later, and respondent agreed to do so (97a, 100a, 102a).

It was during this period that respondent—when he received $92,000.00 under the terms of the Agreement which petitioner negotiated—loaned said $25,000.00.

Respondent denied that he ever engaged petitioner to negotiate on his behalf or that he agreed to compensate him for such services. Respondent defended against payment of his share of the vacation expenses on the ground that he was petitioner's guest.

The case was submitted to the jury on special questions and the verdicts were in favor of respondent.

One of the errors assigned in the Court of Appeals was the instruction to the jury by the trial Judge that petitioner carried the burden of proof to establish his counterclaims by a "clear preponderance of the credible evidence" (462a). Under the substantive law of Pennsylvania, a moving party in a civil action carried only the burden to prove the claim by a "fair preponderance of the testimony." Thus a higher degree of proof was imposed upon petitioner than the established law required.

The Court of Appeals dismissed this assignment by stating (Appendix B; p. 22):

> "We are satisfied that on the whole charge the mistake was de minimus; the jury was not left with the impression that there was a higher grade of proof needed for the counterclaim than for the complaint."

The trial Judge, in his charge to the jury, stated that respondent's witness, Earnest, was a disinterested witness and that he ". . . had no reason not to tell the whole truth and nothing but the truth . . ." (44a).

The Court of Appeals overruled this assignment by stating (Appendix B; p. 23):

> "Not only from the above but on the whole record in this trial of sharply defined issues and proof, we conclude that the district court's above characterization resulted in no substantial prejudice to the defendant."

Under the substantive law of Pennsylvania, interest and credibility of witnesses are issues which are exclusively within the function of the jury, and the trial Judge may not invade the province of the jury as to such matters.

The fourth assignment of error raised in the Court of Appeals which was summarily dismissed without specific discussion or mention involved the improper and unfair cross-examination of petitioner as to personal matters of a degrading nature.

The Court of Appeals dismissed all of the assignments of error without discussing the controlling and applicable substantive law of Pennsylvania or the applicable decisions of this Court.

REASONS FOR GRANTING THE WRIT.

I.

1. The decision of the Court below that the office memorandum prepared by counsel for Stevens entitled "Office Memo re: Settlement of the Tracy-Stevens Litigation" (Exhibit P-3; 478a-481a, incl.) was a business record within the meaning of 28 U. S. C. A., 1732(a) is in direct conflict with the decision of this Court in *Palmer v. Hoffman*, 318 U. S. 477. In the *Palmer* case this Court decided that an accident report of an engineer, prepared pursuant to Company procedure, was not a business record within the meaning of said Statute. In so ruling this Court stated (479, 480):

> "An accident report may affect that business in the sense that it affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls. The conduct of a business commonly entails the payment of tort claims incurred by the negligence of its employees. But the fact that a company makes a business out of recording its employees' versions of their accidents does not put those statements in the class of records made 'in the regular course' of the business within the meaning of the Act. *If it did, then any law office in the land could follow the same course, since business as defined in the Act includes the professions. We would then have a real perversion of a rule designed to facilitate admission of records which experience has shown to be quite trustworthy.* Any business by installing a regular system for recording and preserving its version of accidents for which it was potentially liable could qualify those reports under the Act. The

result would be that the Act would cover any system of recording events or occurrences provided it was 'regular' and though it had little or nothing to do with the management or operation of the business as such. *Preparation of cases for trial by virtue of being a 'business' or incidental thereto would obtain the benefits of this liberalized version of the early shop book rule. The probability of trustworthiness of records because they were routine reflections of the day to day operations of a business would be forgotten as the basis of the rule.*" (Italics supplied.)

Circuit Judge McLaughlin, speaking for the Court below, ruled that said memorandum was a business record within the purview of the Federal Business Records Statute as follows (Appendix B; p. 25):

> "It seems to us that the exhibit was correctly accepted as a business record made by Mr. Earnest in the regular course of his practice and serving not only as his record of his conference with Katz for his client but as his base for the agreement which he drew."

Petitioner cited the *Palmer-Hoffman* decision in the brief filed in the Court below and cited it at the oral argument, but the Court below did not deem it necessary to discuss or distinguish it.

2. The question of the admissibility of memorandums prepared in the course of litigation is of importance in the administration of justice and the trial of civil cases in the Federal Courts.

If memorandums prepared by attorneys of events occurring during the course of their handling of litigation, in the absence of the opposite party, are to be admitted under 28 U. S. C. A. 1732(a), not only would we "then have a real perversion of a rule designed to facilitate admission of records which experience has shown to be quite trustworthy" but the floodgates would be opened at the trial to

receive hearsay testimony of any nature. The Court below stated (Appendix B; p. 25):

> "The most that is urged against the memorandum going into evidence is that no need for it was shown. That was a matter of judgment for plaintiff's attorney. The record does support appellee's contention that the contents of the memorandum simply outlined the general terms of the contemplated settlement which was not contrary to defendant's general account of it."

Completely ignored by the Court below was the statement contained therein (478a):

> "On yesterday I had a conference with J. Jerome Katz, Esq., and Matthew K. Stevens, Esq., in which Mr. Katz reported to me that he, as a representative of Mr. Stevens and Samuel Kamens, as a respresentative of Mr. Tracy, had negotiated a compromise settlement between the parties, in and upon the following terms: . . ."

The admission of the memorandum in effect destroyed petitioner's claim that he, alone, procured the settlement by permitting the jury to consider as substantive evidence statements of Kamens and Katz that they negotiated the transaction for the parties. They did not appear at the trial nor could they be subjected to cross-examination.

This is not the legitimate purpose of the Business Records Statute and is contrary to its basic intent. The ruling that said memorandum is a business record is contrary to the clear statement of this Court in *Palmer v. Hoffman, supra.*

II.

1. The decision of the Court below on the important questions here presented discloses not only a conflict with the decisions of this Court, which of itself warrants re-

view, but is tantamount to indifference to said decisions. The law, as established by this Court, must and should be applied as the law of the case by inferior courts. The Court of Appeals has arbitrarily chosen to disregard this duty.

The Court below failed to consider and apply the Act of June 25, 1948, 28 U. S. C. A., Section 1652 which declares that the rules of decision in civil actions in the Federal Court based on diversity are governed by the laws of the several states. In the instant case the transactions giving rise to petitioner's counterclaims occurred in Pennsylvania and the case was tried in the District Court of Pennsylvania.

In *Erie R. R. Co. v. Tompkins*, 304 U. S. 64, this Court interpreted the phrase "laws of the several states" as used in the Statute, to include state decisions establishing the substantive law of the state. In *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U. S. 487, the principle was reaffirmed and extended to include local rules of conflict of laws.

In these circumstances the decisional law of Pennsylvania governed the issue of burden of proof and the interest and credibility of witnesses, and it was the plain duty of the Court of Appeals to enforce the precepts established in the *Erie* and *Klaxon* cases.

Petitioner cited below a host of appellate decisions of Pennsylvania declaring that the assigned errors required reversal, but the Court, instead of applying said principles, substituted its own judicial appraisal by concluding that the mistake was de minimus and that the jury was not left with the impression that a higher grade of proof was needed for the counterclaims than for the complaint.

2. The Court instructed the jury that defendant Goldberg carried the burden of proving the allegations of his counterclaim by a clear preponderance of the credible evidence (426a). Pennsylvania law merely requires that a party carrying the burden of proof in a civil action must prove his claim by a fair preponderance of the evidence:

Se-Ling v. Margulies, 364 Pa. 45, 70 A. 2d 854, 856. The Supreme Court of Pennsylvania has declared that a higher degree of proof is required under clear preponderance than is required under fair preponderance: *Commonwealth v. Gerard*, 145 Pa. 289, 298. Thus the Courts below imposed a higher degree of proof than Pennsylvania law required.

In *Grove v. Eq. L. Assur. Soc.*, 336 Pa. 519, at p. 524 the Court ruled that conflicting or confusing instructions are grounds for reversal. In *Commonwealth v. Gerard*, 145 Pa. 289, the Court stated at p. 298:

> "But, with two measures of proof before them, one substantially correct and the other erroneous, how is it possible for us to determine which the jury adopted? . . . It is enough to know that the jury may have been misled by erroneous instructions on a point vital to the defense."

3. The trial Judge instructed the jury that respondent's witness Earnest was not an interested witness and that he had no reason "not to tell the whole truth and nothing but the truth" (444a). Under the substantive law of Pennsylvania it is the exclusive province of the jury and not the Court to decide all the facts, the inferences therefrom, the credibility of witnesses and the weight and effect to be given to the testimony.

Among the Pennsylvania decisions supporting this principle are: *Keating v. Belcher*, 384 Pa. 129, 133; *Blumenthal v. Green*, 52 Pa. Superior Ct. 292; *Harrison v. Met. L. Ins. Co.*, 168 Pa. Superior Ct. 474; *Platz v. McKean Township*, 178 Pa. 601, 605; *Corrigan v. Traction Co.*, 225 Pa. 560, 563, 565.

Said decisions hold that it is reversible error for the trial Judge to invade the exclusive province of the jury on said issues.

Although the foregoing authorities were cited in the brief and argued below, the Court of Appeals again summarily ignored them as follows (Appendix B; p. 23):

"Not only from the above but on the whole record in this trial of sharply defined issues and proof, we conclude that the district court's above characterization resulted in no substantial prejudice to the defendant."

4. Under said rule of decision Statute and the explicit rulings of this Court in *Erie R. R. Co. v. Tompkins*, *supra*, and in *Klaxon Co. v. Stentor Elec. Mfg. Co.*, *supra*, there is a clear duty on the part of federal courts in diversity cases to apply and follow the established local law of the State where the actions arose and were tried.

The refusal of the Court of Appeals to apply Pennsylvania law is in conflict with said rules of decision Statute and the decisions of this Court.

There are literally thousands of civil actions based upon diversity of citizenship pending in the federal courts of the several states. If, as here, no regard is shown for applicable State law, the provisions of 28 U. S. C. A., Section 1652 would be nullified and the controlling decisions of this Court in said *Erie R. R. Co.* and *Klaxon* cases, *supra*, would be rendered impotent.

III.

1. The cross-examination of petitioner concerning personal behavior of a disreputable nature, as hereinafter set forth, was such marked departure from the accepted and usual course of judicial proceedings as to call for this Court's supervision. Part of, but not all, of the objectionable cross examination was (Appendix 424a, 425a, 426a):

"By Mr. David F. Maxwell:

"Q. Isn't it true, then, on one day you bet as much as $14,460.00 on the races?

A. Of course not.

Q. It isn't true then during this trip to Florida you bet as much as $150,000.00?

Mr. Lipschitz: I object to this line of cross-examination.

By The Court:

Q. Your answer is

A. Of course not.

The Court: Your answer is 'No.'

By Mr. David F. Maxwell:

Q. It isn't true the bookies were after you for the moneys you owed them and that you borrowed $25,000 so that they would let you leave town?

A. Do I have to take all this, your Honor?

The Court: Yes.

A. If I don't, I certainly don't want to. You know that.

The Court: Mr. Goldberg, just a moment, please.

A. You have to have proof. I'm sorry, your Honor.

By The Court:

Q. Mr. Goldberg, you instituted this counterclaim which we have sat here now for two and a half days and listened entirely to, and if you choose to institute a suit, then you must take the stand, and unless you are going to produce other evidence to support it. You must be subject to cross-examination. Mr. Tracy has been on the stand, and this is a perfectly proper question. I don't know what they have in mind. You must answer any of the questions that are asked you, that I direct. Unless you want to withdraw your counterclaim. There are plenty of options in life. If you want to press your counterclaim, then you must answer the questions. Your counsel has objected and I have overruled his objection, and he has an exception.

A. The only reason—may I say a word for a moment?

Q. No, I just want you to answer the question.

THE COURT: Would the reporter please read the last question.

(The last question was read as follows:

'Q. It isn't true the bookies were after you for the moneys you owed them and that you borrowed $25,000 so that they would let you leave town?')

MR. LIPSCHITZ: I object to the question.

THE COURT: Objection overruled.

THE WITNESS: No, definitely no. . . ."

The accusations phrased in the questions were not substantiated or proven and the prejudice was calculated and intended.[1] Such deliberate attempt to interject personal matters of a degrading nature to create resentment and prejudice against petitioner in the eyes of a jury should never be countenanced by a Court. There is a clear duty on the part of the Courts to protect litigants in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice.

In *N. Y. Cent. R. Co. v. Johnson*, 279 U. S. 310, this Court granted certiorari limited to the question whether the alleged misconduct was so unfairly prejudicial to the defendant as to justify a new trial. In reversing a verdict for defendant on unsubstantiated charges, the Court stated (pp. 318, 319):

"[7] Respondents urge that the objections were not sufficiently specific to justify a reversal. But a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy * * * of

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1. Respondent's attorney was aware of the impact of improper questions and improper offers of proof as shown when, during the trial he objected to an offer of proof as follows (281a):

"Mr. David F. Maxwell: What is the inconsistency?

Mr. Lipschitz: I will bring it out in cross-examination.

Mr. David F. Maxwell: By that time the damage is done."

> no importance to the public.' The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice. See Union Pac. R. Co. v. Field, (C. C. A.) 137 F. 14, 15; Brown v. Swineford, 44 Wis. 282, 293 (28 Am. Rep. 582). Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this court from correcting the error. Brasfield v. United States, 272 U. S. 448, 450, 47 S. Ct. 135 (71 L. Ed. 345)."

The law of Pennsylvania is in full accord with the principles established in *N. Y. Cent. R. Co. v. Johnson, supra.* Where an attorney intentionally makes an offer of such prejudicial evidence, the trial Judge, on his own motion, must act promptly and effectively by reprimanding counsel and withdrawing a juror, in the interest of justice and for the protection of the injured party: *Commonwealth v. Williams*, 41 Pa. Superior Ct. 326, 337; *Wagner v. Hazel Township*, 215 Pa. 219. In *Narcise v. Mauch Chunk Township*, 369 Pa. 549, 551, the Court stated:

> ". . . A verdict obtained by incorrect statements or unfair argument or by an appeal to passion or prejudice stands on but little higher ground than one obtained by false testimony."

2. The objectionable cross-examination was assigned in the Court of Appeals under the fourth statement of questions involved.

The Court of Appeals again declined to apply the substantive law of Pennsylvania as required under 28 U. S. C. A., Section 1652, and the decisions of this Court in the

Erie R. R. Co. and *Klaxon* cases. Petitioner cited *N. Y. Cent. R. Co. v. Johnson, supra*, on this point in the Court below, but the Court of Appeals did not refer to it in the opinion. The Court below summarily dismissed this important question and three other assignments, not relevant here, by stating (Appendix B; p. 25):

> "The remaining contentions of appellant have all been examined. They are without merit. . . . There is no error here in any way warranting reversal."

The same cogent reasons which impelled this Court to grant certiorari in *N. Y. Cent. R. Co. v. Johnson, supra*, are applicable here. There, the accusation as to syphilis was unproven, and here the charges of excessive gambling and welshing on losses were unsubstantiated.

In the instant case, moreover, petitioner's excessive gambling and his characterization as a welsher on gambling debts could have no possible relevance to the merits of his claim for compensation for services rendered to respondent or for his claim for reimbursement for expenses advanced during a vacation trip.

If trial tactics such as those here shown are countenanced by the Courts, no litigant, no matter how just his cause, could safely seek redress in the courts without fear that sordid or blameworthy personal affairs, no matter how unrelated to the central issues will be subjected to disclosure under cross-examination.

CONCLUSION.

The vital and traditional safeguard that in every litigation the trial must be fairly and impartially conducted, and that the verdict of the jury should be based upon evidence uninfluenced by prejudice or resentment, has been violated in this case.

It was the duty of the Court of Appeals to apply and follow the law established by the decisions of this Court and

of the Appellate Courts of Pennsylvania; and the Court of Appeals, by ignoring said established law, in effect reversed the law established in this Court. If, as here, the Court of Appeals can decide cases in conflict with the decisions of this Court, confusion and uncertainty will be widespread.

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

SAMUEL KAGLE,
1500 Bankers Securities Bldg.,
Philadelphia 7, Pennsylvania,
Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing petition is presented in good faith and not for delay.

SAMUEL KAGLE.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,403

A. ARTHUR TRACY, also known as ARTHUR TRACY

v.

MORRIS C. GOLDBERG, also known as
M. C. GOLDBERG,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued March 7, 1961

Before GOODRICH, MCLAUGHLIN and FORMAN,
Circuit Judges

Opinion of the Court.

(Filed April 18, 1961)

By MCLAUGHLIN, *Circuit Judge*.

This litigation is the culmination of a bitter personal feud between two former friends.

On March 23, 1949 Tracy loaned Goldberg $25,000. The latter paid $8500 on account. Tracy sued for the

balance. At the trial the balance was admitted due but Goldberg counterclaimed for (1) money allegedly advanced Tracy totaling $2,694.41 (2) for alleged services in connection with difficulties arising out of a building enterprise. For these Goldberg claimed $50,000 (3) for alleged services regarding purchase of Tracy's interest in the building corporation. Goldberg asked $100,000 on this claim.

The jury found in favor of the plaintiff on his complaint and for him against Goldberg on the counterclaim.

The first proposition argued is that the trial judge overstated the quality of proof appellant needed in order to establish his counterclaim. Appellant was allowed exceptions to the points on behalf of the plaintiff read by the court to the jury. Appellant states that one of these covered the now objected to language. The joint appendix contains 573 pages. Why appellant did not print the point to which he refers and on which he must rely is not readily apparent. His only other stated basis of objection in this connection is the language of his attorney when he said, "I also take an exception about your instruction to the jury about the burden of proof, where it is equally balanced, sir." The present contention has nothing to do with that particular segment of the charge. However, to eliminate any kind of doubt as to whether the question should have been considered by us we have examined it at length.

We find that the judge presented this phase of the case to the jury accurately and fully. He started off by saying, "In a civil case, such as this, the party who has the burden of proof must produce evidence of greater persuasive power than the other party on the factual issues on which he has the burden." Speaking of the questions submitted to the jury within this rule he said: "The party who has the affirmative of the issue has the burden of proof on each of these questions."

He then in a common sense statement said to the jury:

"Now, this burden of proof is often expressed by saying, the party having this burden of proof must establish these facts by the weight or the fair preponderance of the evidence. The law expects you to go through the process of sorting out in your minds, according to persuasive power, the evidence on each issue, and you put the evidence for the plaintiff on one side and the evidence for the defendant on the other. If the evidence for the plaintiff has a greater persuasive power, then you decide for him and you don't have to bother about the burden of proof. If the evidence for the defendant has the greater persuasive power, you decide for him, and you don't have to bother about the burden of proof. The only time you have to bother about the burden of proof is when there is such doubt in your mind that you don't know how to decide. When the evidence seems equally balanced in your mind, and we describe it as, your mind is in equilibrium, then if that is so you must decide against the party having the burden of proof or give the 'No' answer to the question. It is like the scale in the grocery store, you go in and you buy three or four pounds of apples and the grocery man puts a four-pound weight on one side, and he tries to get the four pounds of apples to exactly balance, and it is only when they exactly balance like that, that this becomes important. You know how hard it is to get the exact balance. If there is just a little more evidence of a little more persuasive power in your mind, then you decide according to that persuasive power and you don't bother about this burden of proof. It is only when your mind is in equilibrium you decide against the party having the burden of proof."

Following that he told the jury the plaintiff had the burden on the complaint and regarding the counterclaim,

"On these other questions, they are all on the counterclaim. The defendant has the burden of proof on those, and if you decide that he has not sustained that burden you give the 'No' answer, or you give the smaller amount of damages, if you decide to answer Questions 5 and 7."

Still dealing with counsel's points for charge the judge commented, "While the burden rests upon the party who asserts the affirmative by a preponderance of the evidence, this rule does not require a demonstration or such degree of proof that allows absolute certainty, since in human affairs absolute certainty is seldom possible. In this case, defendant Goldberg carries the burden of proving the allegations of his counterclaim by a clear preponderance of the credible evidence."

It is noted that in the last above quoted sentence the court said, "* * * a clear preponderance of the credible evidence." This inadvertence, resulting apparently from the word "clear" appearing in one of the requests, was so inconsequential after the elaborate instruction which had just preceded it that neither counsel noticed it. As it happened, immediately after the burden of proof points had been disposed of, the court called both attorneys to side bar for the purpose of noting their objections to the charge. The attorney for the defendant went first, objected to three items and as to his fourth and last said, as has been mentioned, "I also take an exception about your instruction to the jury about the burden of proof, where it is equally balanced, sir." There was simply no objection to the use of the word "clear" or even mention of it made to the court.

We are satisfied that on the whole charge the mistake was de minimus; the jury was not left with the impression that there was a higher grade of proof needed for the counterclaim than for the complaint.

Appellant's next point is that, "The Court erred in instructing the jury that Earnest and Fine were not interested witnesses and had no reason not to tell the whole

truth." Here admittedly no objection was made on behalf of the defendant. Despite this, in view of appellant's protestations, we have scrutinized the charge to see if there was prejudicial error in this instance. There is nothing called to our attention or revealed by the transcript to indicate that the statement that these people were not interested was inaccurate. Irrespective of that, the charge turned over the credibility of the testimony squarely to the jury. Said the judge, "It is also your function to evaluate the testimony * * *." And as to witnesses, "* * * whether you think they testified with frankness and candor, or otherwise, * * *. * * * But you must consider all those things in determining what you believe were the facts. What is the truth; what really happened here."

Finally after the judge had referred to the disinterest of Earnest and Fine he specifically instructed that:

> "*It is the quality of the testimony which is important and this must be determined by each juror for himself and herself upon the tendency of the evidence to persuade you or not to persuade you.*" (Emphasis supplied.)

Not only from the above but on the whole record in this trial of sharply defined issues and proof, we conclude that the district court's above characterization resulted in no substantial prejudice to the defendant.

Appellant's third point is that the trial court erred in admitting into evidence a letter dated May 2, 1949. The exhibit, a letter from plaintiff to defendant, receipt of which was never denied, was objected to as a self-serving declaration. It was properly allowed by the judge because as he stated to counsel, "You see, there is still in issue the question of when the debt was to be repaid and this letter, it seems to me, has relevance on that question. You admit now the obligation." As to it being a self-serving declaration, the court said: "That is for the jury to consider, but it does show a demand for payment, at least as of this date in May of 1949." It is now argued that the

claim of plaintiff in the letter to be in a "strapped" financial condition was brought before the jury to arouse sympathy for him and prejudice the defendant. This argument loses whatever little force it may have possessed when an examination of Goldberg's testimony develops that he on at least two separate occasions related how during that period plaintiff had told him "* * * that he had nothing * * * he was being terribly mistreated * * * he had no income and he is broke"; "* * * he was just in very, very bad and horrible shape and he was wearing ragged clothes, he had nothing, he had nothing."

The only other point needing special notice was the acceptance into evidence of an office memorandum of Mr. Earnest, the Washington attorney who represented one Stevens with whom plaintiff was in litigation in 1948. It was for alleged services in connection with the Stevens affair that Goldberg sued Tracy on counts 2 and 3 of his counterclaim. Part of Tracy's defense to those claims was that Goldberg had nothing to do with the Stevens matter after August 5, 1948. Goldberg admitted in his testimony that he had not rendered any services once the Tracy-Stevens controversy had been turned over to the lawyers to draw up an agreement between the parties.

Earnest testified that on August 5, 1948, he conferred with Katz, the representative of his client Stevens, as to drafting a settlement agreement between him and Tracy. The next day he prepared a memorandum of that conference. After that he talked with Tracy's representative. He testified that as a result of that conversation and his memorandum of August 6, 1948, he prepared a formal written agreement for execution by the parties. That agreement was executed August 13, 1948.

The objection to the admission into evidence of the memorandum was that it was used to refresh the recollection of the witness. On behalf of plaintiff it was urged as competent "* * * to establish the time that the people got down to Washington and gave the instructions to counsel."

It seems to us that the exhibit was correctly accepted as a business record made by Mr. Earnest in the regular course of his practice and serving not only as his record of his conference with Katz for his client but as his base for the agreement which he drew.[1]

The most that is urged against the memorandum going into evidence is that no need for it was shown. That was a matter of judgment for plaintiff's attorney. The record does support appellee's contention that the contents of the memorandum simply outlined the general terms of the contemplated settlement which was not contrary to defendant's general account of it.

The remaining contentions of appellant have all been examined. They are without merit. This was an angry, hard fought trial which the district judge made sure was conducted with fairness to both sides. There is no error here in any way warranting reversal.

The judgment of the district court will be affirmed.

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1. 28 U. S. C. A. § 1732; Lind v. Schenley Industries, Inc., 278 F. 2d 79, 88 (3 Cir. 1960), cert. denied, 364 U. S. 835 (1960); United States v. Olivo, 278 F. 2d 415, 416-417 (3 Cir. 1960); McKee v. Jamestown Baking Co., 198 F. 2d 551, 556 (3 Cir. 1952).

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,403.

A. ARTHUR TRACY, also known as
ARTHUR TRACY

v.

MORRIS C. GOLDBERG, also known as
M. C. GOLDBERG,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: GOODRICH, MCLAUGHLIN and FORMAN, *Circuit Judges.*

Judgment.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

April 18, 1961.

Attest:

IDA O. CRESKOFF,
Clerk.